

AN INTRODUCTION TO SENTENCING



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An Introduction to Sentencing in Arizona



Yuma Territorial Prison

Foundations

- At its very basic, sentencing is controlled by A.R.S. §13-701 *et seq.*
 - Non-Title 13 crimes will often have their own sentencing classifications, i.e. Midwifery Fraud §36-757, “Crimes Against the Dead” §32-1634, False Bingo Reporting § 5-410, ETC...
- The “suspension” of a sentence, probation in other words, is governed by A.R.S. §13-901 *et seq.*

Foundations

- Punishment is controlled by the law at the time of the commission of the crime. See *State v. Stine*, 184 Ariz. 1, 906 P.2d 58 (Ct. App 1995); *State v. Hamilton*, 177 Ariz. 403, 868 P.2d 986 (Ct. App. 1993).

Misdemeanors

- Separated into 3 separate classes.
- Above petty offenses, below felonies.
 - Sentencing governed by §13-707
 - Fines found under §13-802
 - Probation length at §13-902(A)(5),(6),&(7)

MISDEMEANOR OFFENSES - § 13-707			
CLASS	MAX. JAIL	MAX. PROBATION	MAX. FINES
1	6 MO.	3 YR.	\$2,500
2	4 MO.	2 YR.	\$750
3	1 MO.	1 YR.	\$500

Misdemeanors

- “Quasi” Misdemeanors under §13-707(B).
 - Convicted of same type of misdemeanor or petty offense within 2 years of previous offense
 - Sentenced under the sentencing range of the next higher class
- *State v. Gulley*, (Ariz. 2017)
 - Class 1 misdemeanors may now go to prison.

CLASS	MIT.	MIN.	P	MAX.	AGG.
6	.33	.5	1	1.5	2

Felonies

- Separated into 6 distinct categories
 - Class 1 = 2 offenses
 - Class 2 = 56 offenses
 - Class 3 = 47 offenses
 - Class 4 = 95 offenses
 - Class 5 = 162 offenses
 - Class 6 = 206 offenses
- 568 distinct felonies*



*Cf in 2009 there were ~4,500 federal offenses

Felony Brands

- Non-repetitive (§13-702)
 - No prior felony convictions.
- Repetitive (§13-703)
 - At least one prior felony conviction.
- Dangerous (§13-704)
 - Involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.

Felony Brands

- Dangerous Crimes Against Children (§ 13-705)
 - One of 22 crimes committed against a victim that is under 15 years of age. See §13-705(P)(1) for list.
- Serious Offense (§13-706(A))
 - One of 12 crimes committed with two prior separate convictions for serious felonies
- Violent or Aggravated Felony (§13-706(B))
 - One of 24 crime committed with two prior predicate violent or aggravated felonies

That Is Quite Presumptuous

- Every felony offense shall start at the presumptive term of imprisonment. §§ 13-702(A); 13-703(D); 13-704(H); 13-705(G).
- Generally sentencing ranges are as follows:

MITIGATED – MINIMUM – PRESUMPTIVE – MAXIMUM – AGGRAVATED



Timing

- A person must be sentenced 15 to 30 days after a conviction. Rules of Crim . Pro. 26.3(A)(1).
- The Court must inform parties of its intent to aggravate or mitigate before passing sentence. §13-702(E).
- The right to a pre-sentence hearing is an “absolute right.” *State v. Ashbury*, 145 Ariz. 381, 701 P.2d 1189 (Ct. App. 1984).

Moving The Needle

- How do you get from presumptive to any range towards the minimum or maximum?
- §13-701 (C)
 - Presumptive → Maximum: requires the trier of fact (either Jury or Court) to find B.R.D. one of the aggravators found in §13-701(D). Cannot be catch all aggravator. *State v. Schmidt*, 220 Ariz. 563 (Ariz. 2008)
 - Minimum ← Presumptive: Requires the Court to find by preponderance of the evidence* one of the mitigators in §13-701(E).

Moving The Needle

- How do you get from minimum or maximum towards the mitigated or aggravated?
- §13-702 (C)
 - Maximum → Aggravated: requires the trier of fact (either Jury or Court) to find B.R.D. two of the aggravators found in §13-701(D). Cannot be catch all aggravator. *State v. Perrin*, 222 Ariz. 375 (App. 2009).
 - Mitigated ← Minimum: Requires the Court to find by preponderance of the evidence* two of the mitigators in §13-701(E).

Moving The Needle

- So is it 2 or 3 total factors to get to the aggravated or mitigated?
 - In order to open the ranges up to the utmost the law allows in sentencing, the court need only have 2 aggravators or mitigators. *State v. Brown*, 209 Ariz. 200, 203, 99 P.3d 15, 18 (2004).
- Once a statutory aggravator is found the “catch all” can be the sole reason for an enhanced sentence. *State v. Bonfiglio*, 231 Ariz. 371, 295 P.3d 948 (2013).

Moving The Needle

- So can the judge impose a sentence between the strict number associated with the aggravated/mitigated term and the presumptive?
 - Yes, the sentence may be any length of time in the range between the legally authorized categories. *State v. Pena*, 209 Ariz. 503, 509, 104 P.3d 873, 879 (Ct. App. 2005); *State v. Henderson*, 133 Ariz. 259, 263, 650 P.2d 1241, 1245 (Ct. App. 1982)(overruled on other grounds).

Stacking Hay On That Needle

- When can a sentence be run consecutively?
 - The default is that, unless noted by the Court, a sentence for a count runs consecutively to a sentence for a separate count. § 13-711(A).
 - A single act that harms multiple victims may be run consecutive for each victim count. *State v. Riley*, 196 Ariz. 40, 992 P.2d 1135 (Ct. App. 1999); *State v. White*, 160 Ariz. 377, 773 P.2d 482 (Ct. App 1989).

Stacking Hay On That Needle

- When can a sentence not be consecutive?
 - “An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent”. § 13-116.
 - Wait? What?!
 - You must apply the “Identical Elements” test to determine whether there is a single “constellation of facts”, “nucleus of operative facts”, “factual transaction”, etc...

Stacking Hay On That Needle

- The Identical Elements Test
 - The court eliminates the evidence supporting the elements of one charge and determines whether the remaining evidence will support the elements of the second charge. *State v. Gordon*, 161 Ariz. 308, 312, 778 P.2d 1204, 1208 (1989). See also *State v. Viramontes*, 163 Ariz. 334, 788 P.2d 67 (1990); *State v. Cotton*, 228 Ariz. 105, 263 P.3d 654 (Ct. App. 2011).

You Must Stack That Hay

- The Court *must* run sentences for these crimes consecutive to any other sentence:
 - PROBATION VIOLATION RESULTING FROM NEW CONVICTION §13-708(E)
 - ESCAPE IN THE 1ST & 2ND §§ 13-2503(B), 2504(B)
 - SEX TRAFFICKING UNDER 18 W/PROSTITUTION § 13-1307(C)
 - SOME DCAC § 13-705(M)
 - ANY FELONY WHILE IN PRISON § 13-711(B)
 - LEAVING SCENE INVOLVING DEATH OR SERIOUS INJURY 28-661(D)
 - KIDNAPPING VICTIM UNDER 15 YRS OLD §13-1304(B)
 - SEXUAL ASSAULT TO ANY OTHER SEXUAL ASSAULT §13-1406(C)

That Haystack Must Go To Prison

- The Court *must* sentence a person to prison for committing any of the following:
 - DANGEROUS OFFENSES § 13-704
 - SECOND OR MORE OFFENSE NOT ON THE SAME OCCASION § 13-703(H)-(I)
 - PROMOTING GANG : +3 YR [CLASS 4, 5, OR 6]; +5 YR [CLASS 2 OR 3] § 13-714
 - DCAC (POSSIBLY FLAT TIME & CONSECUTIVE) § 13-705, excludes 705(E)&(F)
 - DRUGS OVER THRESHOLD
 - DATE RAPE DRUG ADMINISTRATION TO A MINOR § 13-3407(G)
 - NEW FELONY OFFENSE WHILE ON INTENSIVE PROBATION § 13-917(B)
 - PROMOTING OR ASSISTING HUMAN SMUGGLING § 13-715
 - METH OFFENSE INVOLVING SALES, TRANSPORT, MANUFACTURE §13-3607(E)
 - ASSAULT ON OFFICER W/WEAPON OR SERIOUS INJURY §13-1204 (C)

**MY SENTENCE HAS TO BE PRISON, CONSECUTIVE,
FLAT TIME, AND SERVED STANDING ON MY HEAD**

**BUT WEDNESDAY IS CHILI MAC DAY, SO I GOT
THAT GOING FOR ME, WHICH IS NICE**

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First Time Felony Offenders

- No prior felonies or no allegation of priors.
- Governed by §13-702 (D)

CLASS	MITIGATED	MINIMUM	PRESUM.	MAXIMUM	AGG.	MAX. PROBATION
2	3	4	5	10	12.5	7
3	2	2.5	3.5	7	8.75	5
4	1	1.5	2.5	3	3.75	4
5	.5	.75	1.5	2	2.5	3
6	.33	.5	1	1.5	2	3

- Probation is available §13-901(A).
- Probation length is under §13-902(A).
- As term of probation, Court may order up to one year in jail. §13-901(F).

Prior Felony Convictions

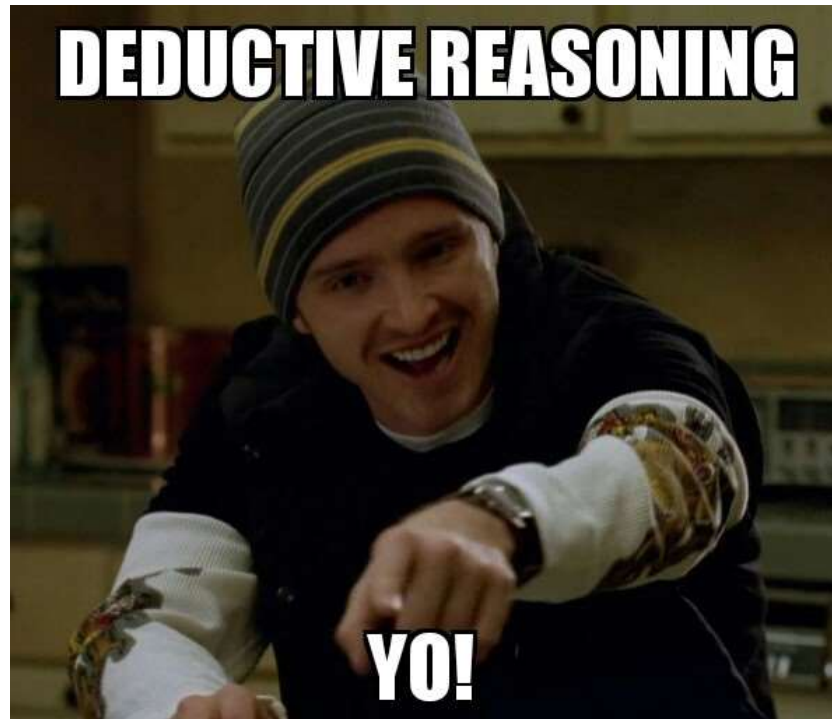
- Huge distinction between “historical” prior convictions and “non-historical”.
- What is a “historical” felony conviction?
 - Time Dependent Historical Priors:
 - A class 4, 5, 6 felony committed within 5 years of the date of the new crime. §13-105(22)(C).
 - A class 2 or 3 felony committed within 10 years of the date of the new crime. §13-105(22)(B).
 - Out of State Felony Conviction w/in 5 years. §13-105(22)(e)
 - Any time spent on Absconder Status, Escaped, or Incarcerated is excluded for calculation.

Prior Felony Convictions

- What is a “historical” felony conviction?
 - Forever Historical Prior:
 - Mandatory Prison Offense §13-105(22)(A)(i)
 - Any Dangerous Offense §13-105(22)(A)(ii)
 - Illegal Control of Criminal Enterprise §13-105(22)(A)(iii)
 - Aggravated DUI §13-105(22)(A)(iv)
 - Any Dangerous Crime Against Children §13-105(22)(A)(v)
 - Any Out of State Dangerous Prior §13-105(22)(F)
 - The 3rd and subsequent felony conviction.
 - 05/15/1945, 06/07/1948, 08/23/1951 (1st), 10/31/1965 (2nd), ETC...

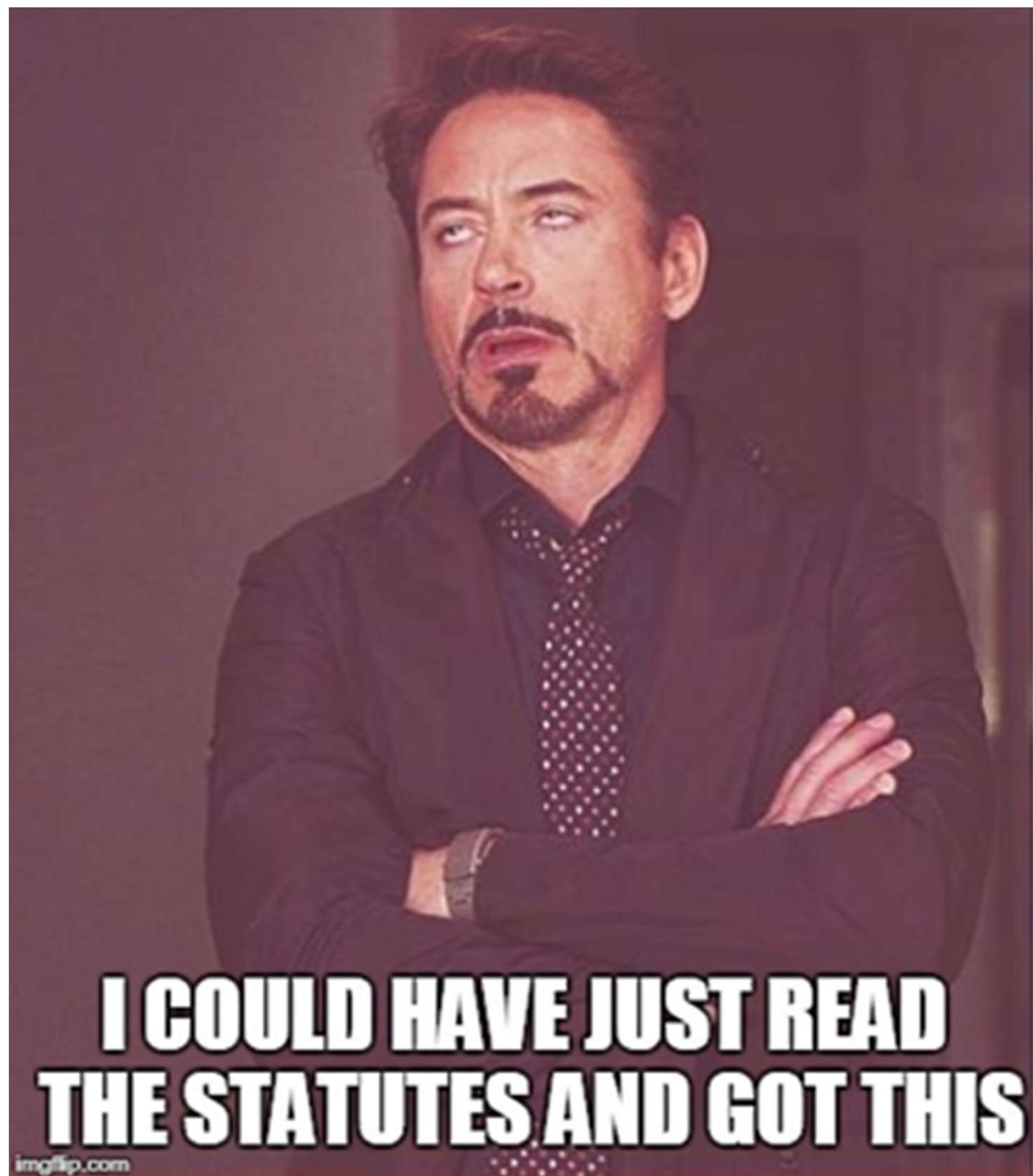
Prior Felony Convictions

- What is a “non-historical” felony conviction?
 - Any prior felony conviction that is not a historical prior felony conviction.



Prior Felony Convictions

- How to count felonies for sentencing analysis.
 - Offenses committed on the same occasion, regardless of how many counts were charged, get lumped together and count as only a single prior felony conviction. §§ 13-703(L); 13-704(J).
 - Factors test. *State v. Kelly*, 190 Ariz. 532, 950 P.2d 1153 (Ariz. 1997).
 - Time
 - Place
 - Number of Victims
 - Whether crimes were continuous and uninterrupted
 - Directed to a single criminal objective



Repetitive Felonies, Category 1

- §13-703(A)&(H)
 - 1 non-historical felony conviction
 - *State v. Hauser*, 209 Ariz 539, 105 P.3d 1158 (Ariz. 2005)
 - 2nd offense in complaint committed on a subsequent occasion

CLASS	MIT.	MIN.	P	MAX.	AGG.
2	3	4	5	10	12.5
3	2	2.5	3.5	7	8.75
4	1	1.5	2.5	3	3.75
5	.5	.75	1.5	2	2.5
6	.25	.5	1	1.5	2

Repetitive Felonies, Category 2

- §13-703(A), (B), & (H)
 - 1 historical felony conviction
 - 2 or more non-historical convictions (Maybe?)
 - 3rd or more offense in complaint committed on a subsequent occasion

CLASS	MIT.	MIN.	P	MAX.	AGG.
2	4.5	6	9.25	18.5	23
3	3.25	4.5	6.5	13	16.25
4	2.25	3	4.5	6	7.5
5	1	1.5	2.25	3	3.75
6	.75	1	1.75	2.25	2.75

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THAT'S JUST, LIKE, YOUR OPINION, MAN

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Repetitive Felonies, Category 3

- §13-703(C)&(J)
 - 2 historical felony convictions

CLASS	MIT.	MIN.	P	MAX.	AGG.
2	10.5	14	15.75	28	35
3	7.5	10	11.25	20	25
4	6	8	10	12	15
5	3	4	5	6	7.5
6	2.25	3	3.75	4.5	5.75

Dangerous Offenses

- An offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person. § 13-105(13).
- “Deadly weapon” means anything designed for lethal use, including a firearm. § 13-105(15).
- “Dangerous instrument” means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury. § 13-105(12).

Dangerous Offenses

- A note on Historical Priors and Dangerousness
 - Applying the historical prior felony calculus is the same as before except for dangerous offenses the prior must also be dangerous.
 - Additionally, if you have a new charge of dangerousness involving a class 2 or 3 felony, the prior dangerous felony must also be either a class 2 or 3 dangerous felony. Finally, class 4, 5, and 6s must also have a corresponding dangerous prior. § 13-704(B)-(E).

BRACE YOURSELF

CHARTS ARE COMING

Dangerous Offenses

- § 13-704

	FIRST DANGEROUS FELONY OFFENSE § 13- 704(A)			ONE HISTORICAL DANGEROUS PRIOR §13-704(B)&(D)			TWO HISTORICAL DANGEROUS PRIORS § 13-704(C)&(E)		
CLAS S	MIN.	P	MAX.	MIN.	P	MAX.	MIN.	P	MAX.
2	7	10.5	21	14	15.75	28	21	28	35
3	5	7.5	15	10	11.25	20	15	20	25
4	4	6	8	8	10	12	12	14	16
5	2	3	4	4	5	6	6	7	8
6	1.5	2.25	3	3	3.75	4.5	4.5	5.25	6

Dangerous Offenses

- Why sentence under the non-dangerous scheme? Your choice. *State v. Knorr*, 186 Ariz. 300, 306, 921 P.2d 703, 709 (Ariz. 1996); *State v. Laughter*, 128 Ariz. 264, 268-69, 625 P.2d 327, 331-32 (Ct. App. 1980) .
- Proceeding under the non-dangerousness structure does not void the classification of dangerousness. *State v. Trujillo*, 227 Ariz. 314, 321-22, 257 P.3d 1194, 1201-02(Ct. App. 2011)

Dangerous Offenses

- § 13-704(A)

	FIRST DANGEROUS FELONY OFFENSE		
CLASS	MIN.	P	MAX.
2	7	10.5	21
3	5	7.5	15
4	4	6	8
5	2	3	4
6	1.5	2.25	3

- § 13-703(C)&(J)

	CATEGORY 3 - § 13-703(C), (J)				
	2+ HISTORICAL PRIORS				
CLASS	MIT.	MIN.	P	MAX.	AGG.
2	10.5	14	15.75	28	35
3	7.5	10	11.25	20	25
4	6	8	10	12	15
5	3	4	5	6	7.5
6	2.25	3	3.75	4.5	5.75

Dangerous Offenses

- § 13-704(F) governs multiple occasions, but no priors.

	2ND DANGEROUS OFFENSE IN SAME COMPLAINT BUT DIFFERENT OCCASIONS OF OFFENSE			3RD+ DANGEROUS OFFENSE IN SAME COMPLAINT BUT DIFFERENT OCCASIONS OF OFFENSE		
CLASS	MIN. (P)	MAX.	INCREASED MAX.	MIN. (P)	MAX.	INCREASED MAX.
2	10.5	21	26.25	15.75	28	35
3	7.5	15	18.75	11.25	20	25
4	6	8	10	10	12	15
5	3	4	5	5	6	7.5
6	2.25	3	3.75	3.75	4.5	5.6

AM I THE ONLY ONE AROUND HERE

**THAT WANTS THIS PRESENTATION
TO STOP?!?!?**

Serious Felony Offenses

- One of the following,
§ 13-706(F)(1)
- First degree murder.
- Second degree murder.
- Manslaughter.
- Aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.
- Sexual assault.
- Any dangerous crime against children.
- Arson of an occupied structure.
- Armed robbery.
- Burglary in the first degree.
- Kidnapping.
- Sexual conduct with a minor under fifteen years of age.
- Child prostitution.

Serious Felony Offenses

- If a person commits either a completed or preparatory offense, and has 2 prior serious felony convictions on separate occasions, then they must be sentenced to 25 to life in prison.
- This specifically does not apply to “a drug offense, first degree murder or any dangerous crime against children.”
 - Say what now, what now?

Violent or Aggravated Felony

- One of the following,
§ 13-706(F)(2)
 - First degree murder.
 - Second degree murder.
 - Aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.
 - Dangerous or deadly assault by prisoner.
 - Committing assault with intent to incite to riot or participate in riot.
 - Drive by shooting.
 - Discharging a firearm at a residential structure if the structure is occupied.
 - Kidnapping.
 - Sexual conduct with a minor that is a class 2 felony.
 - Sexual assault.
 - Molestation of a child.
 - Continuous sexual abuse of a child.
 - Violent sexual assault.
 - Burglary in the first degree committed in a residential structure if the structure is occupied.
 - Arson of an occupied structure.
 - Arson of an occupied jail or prison facility.
 - Armed robbery.
 - Participating in or assisting a criminal syndicate or leading or participating in a criminal street gang.
 - Terrorism.
 - Taking a child for the purpose of prostitution.
 - Child prostitution.
 - Commercial sexual exploitation of a minor.
 - Sexual exploitation of a minor.
 - Unlawful introduction of disease or parasite as prescribed by section 13-2912, subsection A, paragraph 2 or 3.

Violent or Aggravated Felony

- If a person commits either a completed, attempted, or conspired offense, and has 2 prior violent or aggravated felony convictions on separate occasions, then they must be sentenced to 35 to life in prison.
 - Both priors must have happened within 15 years, excluding imprisonment, absconder, and probation. § 13-706(C)(1).
 - First prior must have been imposed before second prior, and second prior must be imposed before new conduct. § 13-706(C)(2).

Dangerous Crimes Against Children



Offenses Committed Out of Custody

- If an offense is committed while on probation or parole:
 - Cannot receive less than presumptive on new offense. § 13-708(A)&(C).

CLASS	MIT.	MIN.	P	MAX.	AGG.
2			5	10	12.5
3			3.5	7	8.75
4			2.5	3	3.75
5			1.5	2	2.5
6			1	1.5	2

Offenses Committed Out of Custody

- If an offense is committed of pre-conviction release:
 - 2 years added to the enter range of sentence they would otherwise have received. § 13-708(D).

CLASS	MIT.	MIN.	P	MAX.	AGG.
6	.33	.5	1	1.5	2

– Transforms into:

CLASS	MIT.	MIN.	P	MAX.	AGG.
6	2.33	2.5	3	3.5	4

Offenses In School Safety Zone

- If an offense is committed in a school zone:
 - 1 year added to the enter range of sentence they would otherwise have received, but if they are a gang member then add 5 years, only to minimum, presumptive, and maximum. § 13-709(A).
 - Non-gang member:

CLASS	MIT.	MIN.	P	MAX.	AGG.
6	.33	1.5	2	2.5	2

- If a gang member:

CLASS	MIT.	MIN.	P	MAX.	AGG.
6	.33	5.5	6	6.5	2

Prison Release Provisions

- If the offense is not a mandatory flat time offense, § 41-1604.07 authorizes an inmates release after 85% of their sentence has been served.
 - Easy rule of thumb: for every 12 months of a sentence, they only actual serve 10 months.
- The Director of Prisons may temporarily release inmates from custody for work projects, medical research, state emergencies, disaster relief efforts, community action activities, or compassionate leave. § 31-233.

Mandatory Flat Time

- Prison release provisions do not apply to:
 - Serious, violent, or aggravated felonies. § 13-706
 - Prisoner assault with intent to incite a riot. § 13-1207(B)
 - Serious drug offense. § 13-3410
 - D.C.A.C. in 1st degree. § 13-705 (except § 705(F))
 - Dangerous or deadly assault by a prisoner. § 13-1206
 - Involving a minor in a drug offense. § 13-3409
 - Possession or transport of meth for sale. § 13-3407(5-10-15; 10-15-20)
 - Dangerous offense committed while on release for a serious felony or dangerous offense. 13-708 (B)
 - Violent crime committed on Marijuana, Narcotics, or Dangerous Drugs. §41-1604.15.
 - Assault on an officer with a deadly weapon/dangerous instrument or causes serious physical injury. §13-1204 (C)(Also must receive at least presumptive.)



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